

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

75-7441

United States Court of Appeals FOR THE SECOND CIRCUIT

In the Matter of the
Complaint of
IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of
the S.S. "IRISH SPRUCE",

For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,
Claimant-Appellant,

SPRAGUE & RHODES COMMODITY CORP., *et al.*,
Claimants-Appellees.

AMERICAN SMELTING AND REFINING COMPANY,
Defendant-Appellee,

against

S.S. IRISH SPRUCE, HER ENGINES, TACKLE, ETC.,
and against

IRISH SHIPPING LTD.,
Defendant-Appellant.

BRIEF FOR CARGO CLAIMANT APPELLEES SPRAGUE & RHODES COMMODITY CORP., ET AL., AND AMERICAN SMELTING AND REFINING COMPANY

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**BRIEF FOR CARGO CLAIMANTS-APPELLEES SPRAGUE
& RHODES COMMODITY CORP., ET AL., AND
AMERICAN SMELTING AND REFINING COMPANY**

Statement of the Case

The carrier appeals from a Judgment entered on July 2, 1975 in the United States District Court for the Southern District of New York (Marvin E. Frankel, D.J.) denying

the carrier's petition for exoneration from or limitation of liability and ordering that cargo owners recover from the carrier and from the charterer, with interest and costs, all damages sustained as a result of the stranding of the carrier's vessel, S.S. IRISH SPRUCE, on Quita Sueno Bank in the Caribbean Sea on January 27, 1972 (1039a-1040a).

Following the stranding of its vessel, the carrier instituted a limitation proceeding in the Court below. Cargo claimants Sprague & Rhodes Commodity Corp., et al., filed an answer to the complaint and a claim for \$2,200,000.00 for physical loss of cargo, salvage and on-carriage expenses. Compania Peruana de Vapores filed a contingent claim and an answer. Cargo claimants filed a cross-claim for \$2,200,000.00 against claimant Compania Peruana de Vapores which, as time charterer of the IRISH SPRUCE, had issued bills of lading for the Master to the cargo claimants for the carriage of their cargo.

The Order of Judge Marvin E. Frankel, dated January 25, 1974, states:

"These cases are referred to the Honorable Gerard L. Goettel, United States Magistrate, as Special Master to hear and report, the parties having consented to this procedure.

It is so ordered."

(Order; Docket Entries viiia, xiva)

Three months later, pursuant to this Order and with the consent of all parties, the matter was heard before Magistrate Goettel on April 24, 25 and 26, 1975. The carrier, as the petitioner for exoneration from or limitation of liability, went forward with its evidence. The carrier's witnesses in Court included its Marine Superintendent, Chief Officer Kelly, Second Officer Healy, one expert on the subject of navigation and an expert on the subject of radio direction finders. The carrier also introduced numerous

exhibits into evidence, including depositions of the vessel's Master, Third Officer, Cadet and the carrier's Assistant Operations Officer. Cargo's witnesses at the trial were an expert on the subject of navigation and an expert on the subject of radio direction finders. The parties introduced more than 90 exhibits into evidence.

Trial of the case covered three days and the transcript of the testimony and proceedings before the Magistrate covered 439 pages. At the conclusion of the hearing the parties rested, made closing arguments and agreed upon a timetable for filing post-trial briefs and post-trial reply briefs.

The Special Master's Report was filed on October 30, 1974 (ixa). The Magistrate found that the vessel was unseaworthy in two respects: (1) in failing to have the up-to-date edition of the East Coast of Central America and Gulf of Mexico Pilot on board, and (2) in failing to have the up-to-date edition of the Admiralty List of Radio Signals on board; and, that the carrier failed to exercise due diligence in not providing the vessel with these navigational publications. The Magistrate found that "the unseaworthy condition" of the vessel in failing to have the current Radio List on board "was an effective cause of the loss. It was a 'proximate cause' . . ." (SMR 27-28).^{*} Limitation of liability was denied and the carrier and the charterer were held liable to cargo for *all* losses and damages resulting from the stranding (SMR 30).

The District Court (Frankel, D.J.) rendered its Memorandum decision on March 4, 1975 confirming with one

^{*}References to the Special Master's Report are identified herein as SMR. The carrier-appellant included in the Appendix the *draft* of the Report instead of the *final* Report. Thus, misquotations of the Report appear in its brief. (See for example, the quotation in the last full paragraph on p. 18 of carrier's brief where "light list [sic]" should actually be "radio beacon list".)

exception, the Magistrate's findings and conclusions. The Court stated:

"The court has studied the record, the painstaking Report of Magistrate Goettel, and the opposed submissions of the parties as to whether the Report should be approved. With one exception, the Magistrate's findings and conclusions are confirmed." (Op., 1017a)

The District Judge indicated that: "The record amply supports, certainly against any claim of 'clear error', the Magistrate's findings . . ." (Op., 1018a).

The District Judge then remanded the case to the Magistrate for the rendering of a supplemental report on "the finding that the crew, and quite particularly Second Officer Healy, would have consulted the up-to-date radio list and thus discovered the availability of the San Andres beacon" (Op., 1021a, 1023a). The parties filed additional briefs on this point. Thereafter, the Magistrate filed a Supplemental Report dated May 8, 1975 wherein he adhered to his earlier findings.

The District Judge then rendered a Supplemental Memorandum decision on June 16, 1975 and stated:

"The parties have had and employed opportunities to seek confirmation or disapproval of the Supplemental Report. The court has reviewed the entire proceeding and these most recent presentations. It is concluded that the Supplemental Report is sound and **should be sustained**. It follows that the relief recommended in the original Report, dated October 15, 1974, will be granted." (Op., 1037a)

Regarding the question on remand, the District Judge added.

"More broadly, the court finds persuasive—*surely not clearly erroneous*—the synthesis of the evidentiary

materials given by the Magistrate in his resolution of this question." (Op., 1038a) (emphasis added)

An interlocutory judgment in favor of cargo was thereupon entered from which the carrier now appeals.

Statement of Facts

The last voyage of the IRISH SPRUCE commenced from ports on the west coast of South America in January 1972. The ship was carrying general cargo destined for New Orleans and other United States Gulf ports.

The vessel was equipped with a Decca Navigator (an electronic position finding device) which cannot be used in the Caribbean area. The vessel was *not* equipped with loran (another electronic position finding device) which can be used in this area. The only other electronic means of navigation on the vessel was the radio direction finder. The vessel was equipped with the 1969 List of Radio Signals (Ex. 10). It was not equipped with the up-to-date 1971 List of Radio Signals (Ex. E).

The projected course of the IRISH SPRUCE after passing through the Panama Canal was northerly toward the Yucatan Pass, so as to pass between Roncador Bank and Serrana Bank to the east, and Isla San Andres, Isla de Providencia and Quita Sueno Bank to the west. Quita Sueno Bank lies about 120 miles east off the coast of Nicaragua in the Caribbean Sea (3a, Ex. 6).

On the 26th a 1200 Noon position was obtained by a running fix from celestial observations. Thereafter the vessel proceeded on various northerly courses based on this position. A star sight fix was not obtained at evening twilight because it started to rain and the horizon was fuzzy (109a, 423a-424a, 512a).

At 1558 on the 26th, course was changed to 330° T. which was designed to take the vessel 11 miles off Roncador Light. The light at Roncador Bank has a range of only 11 miles (Exs. 12 and L). There were rain squalls around while the vessel was near Roncador Bank (536a), and the light is an open framework tower which is difficult to contact by radar because it is not solid (503a). The vessel had hoped to pick up Roncador Light at about 2300 hours on the 26th. However, the light was not seen, nor were any radar targets observed (SMR 5-6).

At 2400 midnight on the 26th the vessel changed course from 330° T. to 323° T. and remained on this course until the time of stranding on Quita Sueno Bank at 0329 hours on the 27th (481a, 533a-534a). The "vessel had been carried twenty-five miles to the west by a strong current." (SMR 8, 502a).

During the eight hours prior to the stranding the vessel passed abeam of Isla San Andres to the west. Most of this time "the vessel's assumed position was slightly more than a hundred miles away from the Isla San Andres radio beacon." At midnight on the 26th "she was less than 90 miles away." At the time of the stranding "she was actually only 105 miles from the beacon" (SMR 20, Ex. 6).

The 1971 List of Radio Signals states that the aero radiobeacon at Isla San Andres transmits *continuously* at a *power* of 1.0. kilowatt, which gives it a designated range of 240 miles (SMR 18, 947a, 951a). The beacon was not used by the ship's officers. The failure to have the up-to-date 1971 List on board, which revealed "the usefulness of the beacon", was an "unseaworthy condition" (SMR 23). "The unseaworthy condition was an effective cause of the loss. It was a 'proximate cause' . . ." (SMR 27-28)

POINT I

The Trial Court properly held that the carrier was liable to cargo for all loss and damage in that its vessel was unseaworthy, in that this unseaworthiness was a cause of the loss, and in that the carrier failed to sustain the burden upon it of proving that it exercised due diligence.

The Vessel Was Unseaworthy

The IRISH SPRUCE was unseaworthy in that she did not have on board the up-to-date List of Radio Signals or the up-to-date Sailing Directions (SMR 16-17; Exs. E, L). The Magistrate properly held that the failure to have the up-to-date List of Radio Signals and the up-to-date Sailing Directions on board constituted unseaworthy conditions (SMR 17, 23). The District Judge confirmed the Magistrate's conclusions of unseaworthiness and, with respect to the List of Radio Signals, said:

"... the court sustains the finding that the absence of the 1971 Admiralty List of Radio Beacons aboard the Irish Spruce constituted an unseaworthy condition. While the existence of the San Andres beacon was noted in various books on the vessel, none of these provided the information contained in the 1971 List concerning the power of the beacon and its continuous operation."

and

"Absence of the revised list deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services."

(Op., 1018a-1019a)

The IRISH SPRUCE was not properly equipped to use her radio direction finder because she did not have the up-to-

date List of Radio Signals. The 1969 List (Ex. 10) that was on board was superseded by the 1971 List (Ex. E), which was published on August 14, 1971. The 1971 List specifically states that it "supersedes the 1969 edition." The 1971 List was made available to mariners from November 6, 1971 (791a, 792a, 957a). The Notice to Mariners canceling the 1969 edition was also issued on November 6, 1971 (792a).

The superseded 1969 List did *not* list the aero radio-beacon at San Andres in the alphabetical list of call signals beginning on page 17 (810a), nor in the geographical index beginning on page 10 (803a), nor in the alphabetical list of Morse identification signals beginning on page 77 (819a), nor in the list of radiobeacons beginning on page 86 (820a, SMR 18). Moreover, the 1969 List contained a specific *warning* that unlisted aero radiobeacons were not considered reliable for marine use, and further "warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error" (SMR 18, 815a).

More important, neither the *power* of the beacon nor the fact that it was in *continuous* transmission, day and night, are shown in the 1969 List, or even in the pullout chart section at the back of said List. Under the circumstances, it is not surprising that the watch officers on board the vessel did not use the aero beacon at San Andres to obtain a *danger* angle or to determine the vessel's position. None of the watch officers knew there was an aero radio-beacon there (76a, 515a, 542a, 556a); and if they had known of its existence, the 1969 List would have discouraged them from using it because San Andres was unlisted and the volume contained a *warning* about unlisted aero radiobeacons (815a). Mr. McNally, cargo's expert on radio direction finders, confirmed that the absence of data about San Andres in the 1969 List (Ex. 10) means "that it had not yet been accredited as a viable aid to electronics navigation" (340a-341a).

The Chief Officer testified that one would look in the alphabetical or geographical index of the List of Radio Signals to find such a radiobeacon (515a). All of the vessel's watch officers testified that, had they known about the aero radiobeacon *and its capabilities*, they would have used it (79a, 122a-124a, 515a, 542a, 543a, 556a). The chart in use on the IRISH SPRUCE (Ex. 6, B.A. Chart No. 1218) did not indicate the existence of an aero radiobeacon at Isla San Andres. This further stresses the importance of the vessel being equipped with the current List of Radio Signals. The Magistrate properly found that "The 1969 List did not reveal that there was an aerial radio beacon on Isla San Andres (St. Andrews Island) that would be valuable marine aid" (SMR 17).

As contrasted with the outdated List that was on board the vessel, the 1971 edition (Ex. E) lists the *aero* radiobeacon at Isla San Andres on page 183 (951a) with all essential details, including its *power* (one kilowatt), the fact that it is in *continuous* transmission, its call sign, the radio frequency, the exact position of the beacon, and the type of radio emission (A 1) that is used (SMR 18). The 1971 edition also lists the aero radiobeacon at San Andres in the alphabetical list of identification signals on page 33 (949a) and in the alphabetical index of stations on page 222 (935a). That the 1971 edition contains new, important data not available before, is stressed in the preface at page 5 where it states that the principal changes include:

"(3) ALL RADIOBEACONS, *including Aero* RADIOBEACONS, are *listed* in *geographical* sequence; all appear in the *Alphabetical* List of Identification Signals and all are numbered." (942a) (emphasis added)

The 1971 edition further states on page 13 that

"Only selected Aero Radiobeacons likely to be of particular use for marine navigation are listed and charted." (945a)

The 1971 edition, at page 183, lists the *power* of the radiobeacon at Isla San Andres as 1.0 kilowatt (951a). At page 19 it specifies that a beacon of 1.0 kilowatt may be expected to be usable under good conditions up to a range of 240 nautical miles (SMR 18; 947a). It specifies that the transmission is *continuous* (951a). "Continuous" means that it is available at all times, day and night, whereas other beacons are available only at limited times (330a). The District Judge affirmed the Magistrate and held that "the absence of the 1971 Admiralty List of Radio Beacons aboard the Irish Spruce constituted an unseaworthy condition" (1018a).

The electronics expert, Mr. McNally, testified that during the voyage of the IRISH SPRUCE, with the weather conditions experienced, the aero radiobeacon on Isla San Andres "would have provided a useful aid to navigation" (353a).

Masters of other vessels confirmed that the aero radiobeacon on Isla San Andres is an effective and accurate means of navigating in this area. Captain McGinty said that RDF is very important in this area of the world, and that the aero radiobeacon on Isla San Andres "is a very good aerial beacon;" (582a). "It is powerful and it is very clear . . . the reception in it is very clear. It is an excellent aerial beacon . . . (582a-583a); and, . . . "in my opinion it is a much clearer signal than a standard marine radio beacon" (606a).

Captain Gregware of United States Lines testified that he knows from his own experience that the Isla San Andres aero radiobeacon gives a continuous signal (648a, 663a). He picked up its signal over 250 miles away and he found it to be good up to 150 miles (652a, 662a). With the information obtained from the aero radiobeacon during the *night*, running fixes were plotted and proved to be as accurate as the star fixes (651a-653a, 660a; Ex. J, Dep. Ex. 1). He relied more on the radio direction finder than on loran (674a).

Captain Lowell said that the aero radiobeacon on Isla San Andres was reliable and provided him with "quite accurate" navigational information during his voyage (695a-696a). Even when he passed through electrical squalls during his voyage, a reading was obtained from the aero radiobeacon (707a-708a).

The carrier claims seaworthiness simply on the basis of a small pullout chart attached to the back of the 1969 List, on which appears an aerobeacon at San Andres. However, the 1969 List did not in any way reveal that such beacon "would be a valuable marine aid" (SMR 17). It did not list the beacon anywhere in the volume itself, it did not list either the *power* or the fact that it was in *continuous* transmission and, moreover, it "contained a warning that unlisted aero beacons were not considered reliable for marine use" (SMR 18).

It was the duty of the carrier to equip the vessel with the proper navigational data and in such a way that it was readily available for use. This duty is *nondelegable*. In *The Maria (Gladioli v. Standard Export Lumber Co. Inc.)*, 91 F.2d 819 [CA 4th 1937], the Court said, at page 824:

"Our view of the law . . . is that charts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and that it is the duty of her owner to supply them."

and

"The duty of an owner in this respect is *nondelegable*; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship." (emphasis added)

In *Atlantic Mutual Insurance Co., et al. v. Cosulich Societa Triestina Di Navigazione*, 15 F. Supp. 745 (S.D.

N.Y. 1936), the Court said at page 751:

"The United States government is at great pains and spares no expense, as is undoubtedly true with respect to the Italian government, to chart channels, post warnings of dangers to navigators, and *keep up to date, and available for use, charts and other information* at comparatively little or no expense. It is necessarily a part of the policy of insuring safety at sea in these enlightened times of modern inventions, and the maintenance of that policy requires the use of every reasonable effort to avoid or minimize danger on the high seas.

For these reasons, shipowners should be held to as *strict accountability* as modern facilities enable them, with reasonable diligence, to provide." (emphasis added)

The W. W. Bruce, 94 F.2d 834 [CA 2d 1938], concerned a situation where the means for immediate correction of a chart were not readily at hand. To make the proper chart correction would have required the deducing of conclusions not directly stated in the available documents. This Court said:

"We do not think an owner performs his duty of due diligence to equip his vessel for safe navigation if the master is required to go through such a process of investigation and reasoning in order to obtain the necessary navigational information."

(p. 838)

The evidence fully supports the Magistrate's finding "that the failure to have the current list of radio beacons aboard the vessel, where the superseded list did not reveal the usefulness of the beacon, was, under the circumstances of this case, an unseaworthy condition" (SMR

23). The District Judge affirmed the Magistrate and held "that the absence of the 1971 Admiralty List of Radio Beacons aboard the Irish Spruce constituted an unseaworthy condition" and that "Positive information that the beacon operated continuously would provide an added incentive to attempt contact during the hours between midnight and 4:00 A.M." (Op. 1018a-1019a).

The carrier argued that the Master had some knowledge of the existence of the beacon at San Andres and would not have been inclined to use the new list even if it had been on board. This argument failed (SMR 19). Captain Kerr did not know the *power* (range) of the beacon. He testified:

"Q. Do you know how much range or power San Andres radio beacon did have?

A. I do not know the amount, but I have been told that it is not strong; *it is quite weak.*" (495a) (emphasis added)

It is no wonder that Captain Kerr did not use Isla San Andres aero radiobeacon. He erroneously thought it was "not strong" but rather "quite weak." Neither the superseded 1969 List nor its pullout chart section in the back Ex. 10(a), could have corrected his erroneous belief as to the beacon's *power* because neither contained this vital information. Only the up-to-date 1971 List could have provided him with this information.

If the IRISH SPRUCE had been equipped with the 1971 List, the stranding would not have occurred. Captain Kerr would have known that the signal transmitted by the Isla San Andres aero radiobeacon was strong—not weak—and that it would have been picked up by the IRISH SPRUCE all along her voyage. Captain McMahon of Irish Shipping Lines testified that before trying to use a radiobeacon he would want to know its *power* to see how far it could transmit; and if he found from the List of Radio Signals that it

was listed as having a 1.0 kilowatt output power with an expectable range of 240 miles, he would "certainly" try to get a bearing off it if he was within range of it (773a). Captain Kerr's ignorance of the aero radiobeacon's power and his erroneous belief that it was "quite weak" (when in fact it is powerful), explains why *he didn't even consider using it*.

In addition, the other officers aboard would have used the beacon at San Andres if they had known about it. The Magistrate properly held:

"Moreover, Kerr was not the only officer aboard. The Chief Officer had testified that if he had known about the beacon, and could have determined its capacities from the index or geographical index, he would have used it. While the Captain had ultimate responsibility for the navigation of the vessel, initial responsibility rested upon the Navigator, Second Officer Healy. His testimony was that he was *not* aware of the radio beacon on the Isla San Andres, and that he would have used it had he been aware of it." (SMR 19; 79a, 122a, 515a, 55C1)

Second Officer Healy was well aware of other radiobeacons in the area which were listed in the 1969 List, and he previously used these other beacons in navigating on the IRISH SPRUCE, as established by his journal (Supp. SMR 1024a-1025a; Journal 902a). The District Judge, after remand, affirmed that the Magistrate was "justified in finding that Second Officer Healy (probably along with one or more other officers) would have consulted and familiarized himself with the new radio list had it been aboard the ship and, based on the additional information contained in the up to date list, would have employed the San Andres beacon . . ." (Op. 1037a).

The officers on the IRISH SPRUCE had no way of knowing the *power* (range) and *hours of operation* of the San

Andres aero radiobeacon or that it could be picked up in the vicinity of Quita Sueno Bank, because the 1971 List was not on board. San Andres is listed with full details in the up-to-date 1971 edition, which the IRISH SPRUCE should have had on board but did not. The District Judge properly affirmed the Magistrate in holding that

"While the existence of the San Andres beacon was noted in various books on the vessel, none of these provided the information contained in the 1971 List concerning the power of the beacon and its continuous operation. The Magistrate could find, as he did, that the power rating, far from being irrelevant, reveals the effective range of the beacon and, as demonstrated by Captain Kerr's own inaccurate knowledge of the beacon, is a factor in an experienced navigator's decision whether to try to make contact."

and

"Absence of the revised list deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services."

(1018a-1019a)

Cargo established that the aero radiobeacon at Isla San Andres transmitted a continuous signal. The 1971 List, published August 14, 1971, specifies that the beacon's operation is *continuous*. The 1972 List (Ex. BB), published September 9, 1972, specifies that its operation is *continuous*. The U. S. Radio Navigational Aids, H.O. Pub. No. 117A (corrected through Notice to Mariners October 31, 1970, pp. 1-45) (Ex. H), confirmed that the beacon transmits continuously at 1.0 kilowatt. Thus, both *before* and *after* the stranding the evidence is the same, i.e. the operation was *continuous*. There were no Notices to Mariners that contain any indication of non-operation or malfunctioning of this beacon at any time. The carrier's

Marine Superintendent was on San Andres shortly after the vessel stranded (Ex. 14A). Yet, he never testified that the beacon was inoperative (134a-171a). The carrier's expert, Captain Cushman, also went to San Andres after the stranding (201a) and he did not testify to any inoperation of the beacon (171a, 244a). No one did. As this Court quoted with approval in *Berwind White Coal Mining Co. v. City of New York*, 48 F.2d 105 [CA 2d 1931]:

"I am to presume a thing always in the state in which it is found, unless I have evidence that in some previous time it was in a different state." (p. 107)

See also, *Carlson v. City of New York*, 150 App.Div. 264, 23 (1912); *G. W. Sheldon & Co. v. Hamburg Amer. P.A.G.*, 28 F.2d 249, 252 (3rd Cir. 1928); *The R.B.M. Burke*, 294 Fed. 987, 989 (E.D. Pa. 1924); and *Wigmore on Evidence*, Vol. II, § 437, page 413 (3rd Ed. 1940). The Magistrate properly found that "there is sufficient evidence to find that the beacon was in operation on the night in question" (SMR 20).

The importance of the vessel being properly equipped to navigate with her radio direction finder (RDF) cannot be overstressed. Both the way the vessel was equipped and the nature of navigation in the Western Caribbean point up the necessity of having a useful radio direction finder.

The IRISH SPRUCE was time-chartered to Compania Peruana de Vapores, also known as Peruvian Lines (2a). The Marine Superintendent for Irish Shipping Ltd. testified at trial that the IRISH SPRUCE had been operating in "the western hemisphere for most of her life" on this charter and that many of the other Irish Shipping vessels operate in the western hemisphere (135a, 163a, SMR 12). The Chief Officer testified at trial that the IRISH SPRUCE had been operating between North and South America

for about seven or eight months (132a-133a). Nevertheless, the vessel was equipped with a Decca Navigator, which is a short range system of about only 200 miles and cannot be used in the Caribbean. The nearest stations for the Decca system are thousands of miles away from the Caribbean (SMR 6, 12; 132a, 249a, 367a). The Chief Officer confirmed that the Decca Navigator cannot be used in Caribbean waters or anywhere else in the western hemisphere outside of Canada (132a).

The vessel was *not* equipped with loran (another electronic position finding device) which can be used in the Caribbean (SMR 12, 14; 78a, 132a, 264a, 372a, 652a, 658a, 666a, 667a; Ex. I, Dep. Ex. 1). Captain Cushman, the expert called by the carrier, testified that, "I would find it very desirable to be on the vessel that had Loran equipment" (205a) and, in referring to Ex. 69, testified that the loran lines on that chart indicate that there is "two-station coverage" in the area of Quita Sueno Bank and that "The angle is very close to a right angle and [it is] a very good angle" (241a). Mr. McNally (electronics expert called by cargo), RADM Patterson (cargo's expert on navigation), the Master, Chief Officer and Second Officer all testified that loran is useful in Caribbean waters (78a, 132a, 249a, 372a, 489a). The publication "Radio Navigational Aids" (Ex. H), at page 7-2, specifically indicates that there is night loran coverage for the entire Caribbean. In fact, loran coverage extends through the entire northern hemisphere (Bowditch, Ex. S ID p. 332). The British Sailing Directions confirm that there is night loran coverage in the Caribbean Sea. The point to be made is that the *radio direction finder* is even more important than it would otherwise be because this vessel was *not* equipped with any other *useful* electronic position-finding device besides the radio direction finder. The Magistrate properly held that although the absence of loran will not be considered an element of unseaworthi-

ness, "this situation does stress the need for making maximum use of the remaining electronic navigational aids aboard the vessel" (SMR 14).

The nature of navigation in the western Caribbean further stresses the importance of the radio direction finder. On this voyage the last celestial fix that could be obtained was the noon position on January 26, which was obtained by taking a sun position line during the morning and then crossing it with the latitude sight at noon in the form of a running fix (SMR 5; 39a). No further celestial position could be obtained because of weather (109a). The lights in this area are very weak (73a, 435a, 458a). For example, the light on Roncador, which the vessel had hoped to pick up before midnight on the 26th has a listed range of only 11 miles (Exs. B and L). The light itself is an open framework tower, and this type is difficult to contact by radar because it is not solid (78a, 187a, 188a, 503a, 934a). Roncador does not have a radar reflector (933a-934a). Moreover, these islands "are very low lying and they are only just above the water" (503a). The *depth sounder* (fathometer) is of no help because the water in this area is too deep, and shoals so rapidly that little warning is given (SMR 6; 71a, 78a, 99a, Ex. 6, Ex. 41).

Thus, the weather was overcast so that no celestial sights could be obtained; the lights are weak; visibility was restricted; the water shoals too rapidly for the depth sounder to give a warning; the radar was of limited navigational use because the banks are low lying; the open framework light towers do not give an adequate radar reflection; and, the vessel did not have a useful electronic position-finding device (loran). Accordingly, the *only* useful aid available was the *radio direction finder*. RADM Patterson, who had been a Master of 12 merchant vessels (245a), confirmed that without loran you are limited to visual navigation and the radio direction finder (249a). The Chief Officer

confirmed that if you don't have ~~lo~~ the next best thing is the radio direction finder (134a).

Mr. Irving McNally, the electronics expert, is thoroughly familiar with both the operation and theory of radio direction finders. He graduated with a degree of Bachelor of Electrical Engineering in 1931 and then was in the Navy for 25 years. During his early years in the Navy he had extensive experience in personally operating radio direction finding equipment as a navigational aid (310a). Subsequently, he spent 13 years working on the development of radio direction finding equipment and other navigational equipment while at the Naval Research Laboratory in Washington, D.C., the Navy Electronics Laboratory, the Bureau of Ships, and the Office of Naval Research at Lincoln Laboratory (M.I.T.) (310a-314a). After his Navy career he was with the Raytheon Corp. for 14 years where he was manager of radar and other navigation aids (312a). Mr. McNally testified on cross-examination regarding the use of radio direction finders:

"Q. I take it clearly you are quite enthusiastic about it as an aid to navigation.

A. Absolutely." (360a)

The importance of radio direction finders and the associated radiobeacon stations is stressed in the 1960 Safety of Life at Sea Convention (SOLAS), Chapter V—Safety of Navigation—where it is stated:

"Regulation 12

Radio Direction-Finding Apparatus

(a) *All ships of 1,600 tons gross tonnage and upwards, when engaged on international voyages, shall be fitted with radio direction-finding apparatus complying with the provisions of Regulation 11 of Chapter IV.*

(b) The Administration may, in areas where it considers it unreasonable or unnecessary for such ap-

paratus to be carried, exempt any ship under 5,000 tons gross tonnage from this requirement, *due regard being had to the fact that radio direction-finding apparatus is of value both as a navigational instrument and as an aid to locating ships, aircraft or survival craft.*" (emphasis added)

Ireland, Great Britain and the United States are all signatories to the Convention and have accepted and ratified its provisions.

The importance of RDF as a navigational aid was stressed in *Waterman Steamship Corporation v. Gay Cottons (The Chickasaw)*, 414 F.2d 724 [CA 9th 1969], where the vessel's deviation card for the RDF equipment was not kept up-to-date. The Court said at p. 737:

"But the failure to have an 'efficient' radio direction finder is sufficient to deny limitation of liability if it merely *combined* with the crew's negligence in using it to be one of the causes of the stranding. The crew might well have been fairly careless with it precisely *because* they thought its readings would be of little value without an up-to-date deviation card. Nevertheless, the crew did take several fixes. Why would they have done so if they had not thought, or at least hoped, that it would be useful? How can it be said, except as a matter of pure speculation, that if the finder had worked properly the grounding would still have occurred?

"The navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transfer unseaworthiness into bad seamanship." *The Maria*, 4 Cir., 1937, 91 F.2d 819, 824." (emphasis added)

**The unseaworthiness of the vessel was a
cause of the loss.**

The Magistrate correctly found that the absence of the up-to-date Radio List was an unseaworthy condition which "was an effective cause of the loss. It was a 'proximate cause' . . ." (SMR 27-28). The District Judge affirmed the Magistrate and said:

"The Magistrate followed a correct conception of the applicable law in his analysis of the causation issue. The law under the Carriage of Goods by Sea Act is clear that if both an 'excepted peril' under § 4(2), 46 U.S.C. § 1304(2) (1970), and unseaworthiness or another element described in § 3(1), 46 U.S.C. § 1303(1) (1970), concur in causing cargo damage, the shipowner is liable for the entire loss unless he can exonerate himself from part of the liability by showing that some portion is attributable solely to the 'excepted peril'. See *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 588 (2d Cir. 1971), *Union Carbide & Carbon Corp. v. The Walter Raleigh*, 109 F.Supp. 781, 791 (S.D.N.Y. 1951), *aff'd*, 200 F.2d 908 (2d Cir. 1953). This familiar doctrine, given the basic events as the Magistrate reconstructed them, leads to the result he reached. There were concurring causes in the pertinent sense." (Op. 1019a-1020a)

These findings are in accord with the established case law. In addition to the above cited cases, see *Ionian Steamship Co. v. United Distillers of America*, 236 F.2d 78, 80 (5th Cir. 1956); *The Temple Bar*, 45 F.Supp. 608 (D.C. Md. 1942), *aff'd* 137 F.2d 293 (4th Cir. 1943); *Spencer Kellogg & Sons, Inc. v. Great Lakes Transit Corp.*, 32 F.Supp. 520, 532 (E.D. Mich. 1940); and *Waterman Steamship Corporation v. Gay Cottons*, 414 F.2d 724 (9th Cir. 1969). In the *Waterman* case a vessel was held

to be unseaworthy in failing to have an up-to-date deviation card for its radio direction finder. The Court said:

"But the failure to have an 'efficient' radio direction finder is sufficient to deny limitation of liability *if it merely combined with the crew's negligence in using it to be one of the causes of the stranding.*

* * *

How can it be said, except as a matter of pure speculation, that if the finder had worked properly the grounding would still have occurred?" (p. 737) (emphasis added)

The District Judge stated with respect to the *IRISH SPRUCE*:

"Absence of the revised list deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services."

(Op. 1019a)

The Magistrate properly found that "the beacon on San Andres would have provided an excellent 'danger bearing'" (SMR 22); and, that "a danger bearing of 205° T. or greater could have been used, and if maintained would have kept the vessel out of danger" (SMR 22).*

* The Magistrate held that the failure to have the up-to-date Sailing Directions (The Pilot) (Ex. D) on board also constituted an "unseaworthy condition" (SMR 17). The vessel stranded because it "had been carried twenty-five miles to the west by a strong current" (SMR 8). The up-to-date Pilot (Ex. D) contained the following "Caution" (not contained in the superseded Pilot on board.—Ex. 7, 786a-787a):

"Current.—Caution. Caution should be exercised when passing eastward of Quita Sueno Bank as the current here *sets strongly to the westward and on the bank.*"

(Ex. D, 938a) (emphasis added)

Cargo contended that this "unseaworthy condition" was a cause of the stranding. The Magistrate held it "was, at most, only a small contributing factor to the loss" (SMR 17) and "might have been a contributing although not proximate cause" (SMR 29).

The findings below are fully supported by the evidence. RADM Patterson testified that a single bearing would have given a "danger angle" and would have warned those on the IRISH SPRUCE that the vessel "was stranding into danger" (273a-274a). He testified that, as the IRISH SPRUCE proceeded north, the danger angle "would become more valuable because it would be closer to your hazard" (274a); that the angle became more significant considering the location of Isla San Andres and Quita Sueno Bank and the projected track of the vessel "because it would not be so much over on the beam. It would drop further abaft the beam and it would be more in line with the vessel's course" (274a-275a).

The carrier unsuccessfully attempts to avoid the conclusion that a danger angle taken on San Andres aero radiobeacon would have prevented the stranding. In its attempt, the carrier misstates the evidence. On page 37 of its brief the carrier alleges that when squalls interfere, a bearing "can be in error by 10°". It refers to the testimony of Captain Lowell who said that on a voyage which he made in this area, during some squalls the "null" of the signal received from San Andres had increased from 5° to 10°. It was established that this does *not* mean the bearing on San Andres was in error by 10°. Captain Lowell explained that the "null" is the number of degrees between when the bearing signal fades and is then picked up again. The "null" is the silent part—not an error. The *mean* of the 10° "null" gives the actual bearing on the radio direction station (721a-723a). Captain Lowell testified that the aero radiobeacon on Isla San Andres was reliable and provided him with "quite accurate" navigational information during his voyage (695a-696a). Even when he passed through electrical squalls during his voyage, a reading was obtained from the San Andres beacon.

The only effect was that the signal was a little weaker and the null increased from 5° to 10° (707a-708a).

Mr. McNally confirmed that a 10° null is *not* a 10° error. One can, with a high degree of confidence, split it, and be within 1/2 a degree of accuracy (377a-378a).^{*} Mr. McNally further testified that during the voyage of the IRISH SPRUCE, with the weather conditions experienced and the pitching and rolling of the vessel, the aero radiobeacon on Isla San Andres "would have provided a useful aid to navigation" (352a-353a).

The Magistrate further found that the San Andres aero radiobeacon could have been used "to make a 'running fix' from successive bearings" and that this "would have given a better approximate position than a dead reckoning carried for 12 or more hours" (SPM 21-22). The District Judge affirmed the Magistrate and held that use of the San Andres aero radiobeacon:

"... would have made possible the obtaining of a 'running fix' from the beacon which would have revealed that the ship was off course and avoided the stranding." (Op. 1018a)

The carrier's contention that running fixes from successive bearings on the same object "are scarcely ever attempted on RDF signals" and that "in any case *these* navigators would not have attempted it, whether or not the 1971 edition was on board" (Carrier's Brief 37), is contrary to the evidence. Running fixes are commonly used. RADM Patterson testified that using RDF bearings on one

^{*} This was previously pointed out in cargo's post-trial brief, pp. 53-54; however, the carrier still tries to equate the term "null" with the word "error". This is completely wrong.

transmitting station to get a running fix is a "common technique all over the world" (267a-268a).

Moreover, *these* navigators would have used San Andres if given the benefit of the 1971 List. Captain Kerr testified that he did not use the aero radiobeacon on Isla San Andres because it was over 100 miles away. However, he admitted on cross-examination that he did not know how much power it has (he mistakenly thought it is "quite weak") (495a), and that the navigation technique of using a "running fix" can be used with a radio direction finder (497a). He testified that there were "no direction findings" in that area (458a), and that they did not use the direction finder because "There was nothing to use it on." (483a). But, if he had had the up-to-date 1971 List, which included and listed the aero radiobeacon at Isla San Andres *in complete detail*, particularly the *power* (range), he would have known that there was a beacon to use the radio direction finder on.

Second Officer Healy's duties included navigation of the vessel and responsibility for all charts and nautical publications (29a-30a, 493a, 526a). He was the officer on watch at the time of stranding. The Magistrate heard his testimony; observed his demeanor; examined the documents in evidence including Mr. Healy's Journal (red book) (Ex. 52, 855a-925a); and concluded that Mr. Healy was "an unusually conscientious navigator" (SMR 20). The carrier itself referred to Mr. Healy's "meticulousness in matters of navigation" (Carrier's Post-Trial Brief, p. 12). Mr. Healy testified that he would have used a radiobeacon "if there were one within range" (542a). He also confirmed that the technique of using a "running fix" can be used with a radio direction finder (543a). The Magistrate properly held:

"As mentioned earlier, Healy had been along this course before. He had used the beacons on Swan Island and Grand Cayman and recorded the signals

in his own journal. He turned on the radio Direction finder to Swan Island when he came on duty and because he knew it was there, but he did not know of San Andres. When Healy came on watch, the Swan Island beacon was approximately 300 miles away and San Andres only 100 miles. He acknowledged in his deposition that if there was a beacon within range, it would have been of value. It follows that if he would try a station 300 miles away, he would certainly have tried one only one-third that distance.

As all parties acknowledged, Healy was an officer of 'meticulosity in matters of navigation'. (Carrier's Post Trial Brief P. 12). His personal journal (Ex. 52) contains a half dozen references to radio direction finder beacons. (February 8, March 7, July 17, July 26, September 1, October 1). From his prior performance, plus his testimony, it is apparent that he used radio beacons whenever they were available and necessary. On the prior voyage southward, he used Swan Island and Grand Cayman on October 1, but on October 2, despite overcast skies which prevented celestial sights, no attempt was made to use the RDF as they sailed south from the Quita Sueno and Roncador Bank passage. The obvious explanation for this is that they were out of Swan Island's range and did not know of the San Andres beacon. Indeed, both Healy and other ship's officer involved in taking navigational sights (Chief Officer Kelly), testified of their inability to find San Andres in the old radio list aboard, either in the index or the geographical listings." (Supp. SMR 1027a)

Chief Officer Kelly testified that he did not know there was a radiobeacon on Isla San Andres, but "If I had

known it was there by looking up the index or geographical index as I said before I would have used it, yes" (515a). He further testified that he would look in the indexes if he wanted to find a radiobeacon. He said:

"Yes, that is the only place where you will find out whether there are radio beacons, looking in there, because most of the radio beacons round here are aero radio beacons, and you have to check in the index to see whether it has one." (515a)

Kelly confirmed that the technique of a "running fix" can be used with a radio direction finder (517a).

In affirming the Magistrate on remand, the District Judge stated:

"... the Magistrate's further analysis of the record compels affirmance of the disputed finding. For the reasons he outlines, and upon the record documentation he notes, the Magistrate is now found to have been justified in finding that Second Officer Healy (probably along with one or more other officers) would have consulted and familiarized himself with the new radio list had it been aboard the ship and, based on the additional information contained in the up to date list, would have employed the San Andres beacon, only 100 miles off when he came on watch ..."

* * *

"It is plain that the Magistrate had a correct view of the burden of proof and that he violated none of the rules or supposed rules limiting the drawing of inferences from evidence. It was not error, for example, to consider Healy's proved record of meticulousness, including his habits of learning and employing radio beacons and other aids, along with other evidence, in deciding what he probably would have

done on the night in question had the new list been on the vessel before then. More broadly, the court finds persuasive—surely not clearly erroneous—the synthesis of the evidentiary materials given by the Magistrate in his resolution of this question.”

(Supp. Op. 1037a-1038a)

The absence of the up-to-date 1971 List containing the essential, additional information which was absent from the superseded 1969 List was an unseaworthy condition which caused the stranding.

On pages 27 to 30 of its brief, the carrier refers to the *Maru* case (*Director General of the India Supply Mission v. The Maru*, 459 F.2d 1370 (2 Cir. 1972), cert. denied 409 U.S. 1115 [1973]), and to the *Nicolaos S. Embiricos*, 1974 A.M.C. 2608 (S.D.N.Y. 1973), affirmed without opinion, 506 F.2d 1395 (2d Cir. 1974).^{*} These cases are distinguishable from the instant case.

In the *Maru* case this Court said:

“It is not disputed that the chart was almost 20 years old and inaccurate. For this reason the vessel was unseaworthy as found by the lower court *Farr v. Hain S.S. Co.*, 121 F.2d 940, 945 (2d Cir. 1941); *The Maria*, 91 F.2d 819, 824 (4th Cir. 1937).”

and

“The master’s testimony was that he did not check any chart in setting his course; that he navigated without a pilot, and that he depended upon his knowledge of the waters, making visual observations and heading on an angle with Holmes Cay which he could see ahead.

^{*} The carrier’s additional reference to *In Re Marine Sulphur Queen*, 460 F.2d 89 (2 Cir. 1972), pages 27-28 and 31-32 (Carrier’s Brief), is inappropriate because that case concerned private carriage, as contrasted to common carriage under the Carriage of Goods by Sea Act in the instant case.

The master testified:

'I knew by estimation, seeing outside; outside, I mean, the land. And I maneuvered the ship by estimation, without plotting the course for positions from the chart.'

and

"... the trial court found that the master had not relied upon the chart but was sailing *solely by visual observation* hence the chart could not have possibly been the cause of the strand. We agree therefore with the finding that the master's negligence in navigation was the cause of the strand." (459 F.2d 1370, 1372-1373) (emphasis added)

The outdated chart on the *Maru* is the same type of situation as the outdated List of *Lights* (Ex. 12) on the *IRISH SPRUCE*. The List of Lights on the *IRISH SPRUCE* had been superseded by the up-to-date List of Lights dated May 15, 1971 (Ex. L). The *IRISH SPRUCE* was unseaworthy in this respect, however, this particular unseaworthiness was not causally connected with the stranding.

But the *Maru* situation is *not* the same situation as the up-to-date 1971 List of *Radio Signals* which was *not* on the *IRISH SPRUCE*. Not a single officer on the *IRISH SPRUCE* testified that he would *not* have used the up-to-date List of Radio Signals. To the contrary, the evidence established that they would have used the up-to-date List of Radio Signals. This is exactly opposite to the situation presented in the *Maru* case.

The *Nicolaos S. Embiricos*, *supra*, is also distinguishable. In that case Judge Frankel's factual finding, based on the evidence, was that radar would not have been used even if information contained in the up-to-date Pilot had been on board (1974 A.M. C. 2608, at p. 2613, and footnote thereon). The Master of the *NICOLAOS S. EMBIRICOS* testified that dur-

ing an earlier passage he had employed the radar and obtained no readings. Judge Frankel therefore concluded that the up-to-date Pilot, which suggested that certain islands could be detected by radar at a range of 20 miles, would not have induced the Master to use the radar for this purpose on the later voyage because he had already tried this.

No one on the IRISH SPRUCE had previously tried to get a radio bearing on San Andres. The watch officer on the IRISH SPRUCE did not know of its existence and the Master did not know its *power* or that its operation was *continuous* day and night. Judge Frankel held:

"The Magistrate could find, as he did, that the power rating, far from being irrelevant, reveals the effective range of the beacon and, as demonstrated by Captain Kerr's own inaccurate knowledge of the beacon, is a factor in an experienced navigator's decision whether to try to make contact. Positive information that the beacon operated continuously would provide an added incentive to attempt contact during the hours between midnight and 4:00 A.M." (1018a-1019a)

The Magistrate, who heard Second Officer Healy's testimony, found:

"His testimony was that he was *not* aware of the radio beacon on the Isla San Andres, and that he *would* have used it had he been aware of it. While Mr. Healy is relatively young, he appeared to be an unusually conscientious navigator. Had he had the revised list on board, I find that he would have examined it, determined the availability of the radio beacon, and used it." (SMR 19-20)

Following remand by the District Judge, the Magistrate adhered to his earlier finding (Supp. SMR 1029a).

and the District Court affirmed (Op. 1036a-1038a). Thus, whereas in the *Maru* and the *Nicolaos S. Embiricos* cases, *supra*, the Court found that the facts were that the navigators would *not* have used up-to-date information even if it had been on board, in the instant case the factual finding, supported by the evidence, is that the up-to-date List of Radio Signals would have been used on the *IRISH SPRUCE* had it been on board.

The carrier did not sustain its burden of proving that it exercised due diligence to make the vessel seaworthy.

Section 1304(1) of the Carriage of Goods by Sea Act specifically provides that:

"Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of *due diligence* shall be on the carrier or other persons claiming exemption under this section."

The Magistrate correctly stated the law with respect to the carrier's burden of proving due diligence. He said:

"The burden is on the carrier to prove that it used due diligence to make the vessel seaworthy. This burden is clearest and never shifts from the carrier. 46 U.S.C. 1304 (1).²⁴ Any question as to the exercise of due diligence is strictly construed against the carrier. *Compagnie Maritime Francaise v. Meyer*, 248 F. 881 (9th Cir. 1918). In *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 783 (2d Cir. 1946), Judge Learned Hand said:

"the warranty of seaworthiness is favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized.'" (SMR 28)

The carrier's "bureaucratic system" (SMR 28) which it used in providing its vessels with navigational publica-

tions was deficient. The carrier merely went through a procedure whereby a notice to mariners was first obtained by an agent from the British Admiralty; thereafter the agent would mail the notice to the carrier's office in Dublin; thereafter the carrier would mail the notice to the ship; after the ship got the notice they could "make an order of purchase" (151a); the ship would mail the order back to the office in Dublin; the office in Dublin would send the order to the agent in Hull, England; the agent in Hull would purchase the publication that the ship asked for in the order; and then the agent in Hull would be directed by the office in Dublin to mail it to the ship. The carrier never told the agent in Hull to *airmail* these publications to the ship as soon as they are issued (151a-152a).*

The Magistrate properly found:

"While there are many publications whose necessity is a matter of discretion, the Pilot (whose absence might have been a contributing although not proximate cause) and the List of Radio Signals were clearly necessary to the vessel, and no order from the navigator to the home office should have been necessary. The 1971 List of Radio Signals could have been obtained by owners two and one-half months before the stranding. Indeed, the notice that the publications were available (rather than the publications themselves) was received by the ship a month and a half before the stranding. Publications, when ultimately sent, were not even air mailed. The publications should have been obtained by the owners as soon as they were available and immediately air mailed to the vessel. The failure to do so constituted a lack of 'due diligence'." (SMR 29-30)

* The carrier improperly contends at page 25 of its brief that the new edition of the Radio List was sent by "air mail" to New Orleans. Not so. There is no evidence to support such a contention. The chart agent was not told to air mail the publication to the ship (152a).

The 1971 List was made available to mariners from November 6, 1971 (791a-792a, 957a). The Notice to Mariners cancelling the 1969 edition was also issued on November 6, 1971 (791a-792a). The carrier's marine superintendent admitted that other companies would send out "the list of radio signals or pilot or chart directly to a ship without waiting to be asked for it" (146a).

POINT II

The case was referred to a Magistrate by the District Judge to hear and report, the parties having consented to this procedure. The Magistrate properly heard the evidence and filed a Report containing his findings and conclusions. The District Judge studied the record and the Magistrate's Report and approved it with one exception. After remand the District Judge reviewed the entire proceeding and properly concluded that the Magistrate's Supplemental Report was sound and should be sustained.

In Point III of its brief, the carrier complains that it has been treated unfairly by the Magistrate and by the District Judge (Carrier's Brief, pp. 38-50). All parties originally *consented* to the case being heard by the Magistrate (Order of Frankel, D.J.; Docket Entries viiia, xiva). No objections were made by carrier to this procedure. Therefore, the carrier's alluding to a reference "ordered by the District Court over the parties' objections" (Carrier's Brief p. 39) is wrong. The carrier consented to the procedure, participated willingly in a full trial before the Magistrate, went first in introducing its evidence (both exhibits and witnesses, some from England and Ireland), and complained only after the case had been decided against it.

In its Statement of Issues Presented for Review (Carrier's Brief pp. 1-3), the carrier does not challenge the

procedure which was followed by the Magistrate and by the District Judge, and to which the carrier gave its consent and full participation. Yet on pages 38-39 of its brief, the carrier for the first time suggests that the reference to which it consented may have been improper. This suggestion is without merit. As the Court said in *Cruz v. Hauck*, 515 F.2d 322 (5th Cir. 1975):

“Rule 53(a) authorizes a court in which any action is pending to appoint a special master.” (p. 327)

and

“A party objecting to a reference should do so prior to or at the time of the reference. If this is infeasible, the objection should be made to the judge at the earliest possible opportunity. 5A J. Moore, *Federal Practice* ¶ 53.-05[3] (2d ed. 1974). Such procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master’s report would be able to obtain ‘a second bite at the apple’ by withholding his objection to the reference until after the report. Since appellants did not object to the reference in the district court, we hold that they waived their right to object and may not do so for the first time on appeal.” (p. 331)

In the instant case, moreover, all parties consented to the reference. Accordingly, there can be no basis for objection.

Oddly enough the carrier complains about the Magistrate’s understanding of navigation in a navigation case (Carrier’s Brief, pp. 39-40).^{*} The carrier contends that the Magistrate “improperly relied upon opinions formed as commanding officer of Loran stations” (Carrier’s Brief p.

^{*} “And there comes a point where this Court should not be ignorant as judges of what we know as men.” *Watts v. Indiana*, 338 U.S. 49, 52 (1949).

38, headnote). The carrier's statement that the Magistrate had "a preconceived opinion" (Carrier's Brief p. 47) and that his decision was based upon "his improper reliance upon his own preconceived preference for Loran" (Carrier's Brief p. 50) is incorrect and unfair. The IRISH SPRUCE was equipped with a Decca Navigator (electronic position finding device). However, the Decca system is not operable in the Caribbean because there are no stations located there (78a, 132a, 249a, 489a). It is a short range system of only about 200 miles, and the closest stations are thousands of miles away (SMR 6, 12; 132a, 249a, 367a). The Decca Navigator is a nice piece of equipment but it is of no use in the Caribbean. The IRISH SPRUCE was not equipped with loran (another electronic position finding device) which can be used in the Caribbean (78a, 132a, 264a, 372a, 652a, 658a, 666a-667a; Ex. I Dep. Ex. 1). The only other electronic means of navigation on the IRISH SPRUCE was the radio direction finder.

Based on the foregoing evidence, the Magistrate properly held that the situation on the IRISH SPRUCE (i.e., absence of loran and presence of the useless Decca Navigator):

"... does stress the need for making maximum use of the remaining electronic navigational aids aboard the vessel." (SMR 14)

This is not indicative of "a preconceived opinion" (Carrier's Brief p. 47). It is good common sense.

The Magistrate properly found:

"Considering the unavailability of celestial observations, the fact that the vessel was equipped with the wrong type of electronic position finding device, and was operating in open waters too far from land to make any use of the radar and too deep for the depth sounder to be of any value, the importance of the use

of the radio direction finder in this instance is apparent. The courts have recognized the general importance of the radio direction finder as a navigational aid. *Waterman Steamship Corp. v. Gay Cottons (The Chickasaw)*, 414 F.2d 724 (9th Cir. 1969). Radio direction finders are required on all ships of 1600 tons gross tonnage and up when engaged on international voyages. (1960 Safety of Life At Sea Convention, to which both Ireland and the United States are signatories, Chap. 5, Reg. 12.) Consequently, I find that the failure to have the current list of radio beacons aboard the vessel, where the superceded list did not reveal the usefulness of the beacon, was, under the circumstances of this case, an unseaworthy condition." (SMR 22-23)

The District Judge considered the carrier's protests concerning the Magistrate's views on loran and found these protests to be "(s) till more clearly unavailing" (Op. 1020a)

The carrier's contention that the Magistrate's experience with loran "so thoroughly influenced the Special Master's reasoning as to account for his manifest errors in the application of the COGSA rules of burden of proof" (Carrier's Brief p. 41) is likewise without merit. The carrier was held liable because its vessel did not have on board the up-to-date Radio List. The Radio List has nothing to do with loran. The Radio List is to be used with the radio direction finder (the IRISH SPRUCE's *only* useful electronic navigational device in these waters) and not with loran. The Magistrate, even though he had some experience with loran (369a; SMR p. ii, footnote 16), refused "to venture into perilous legal seas with inadequate appellate guidance" (SMR 14). Rather than making any "claim of expertise" (Carrier's Brief p. 49), upon which a finding of unseaworthiness could have been made with respect to

loran, the Magistrate said:

"No expert testimony was presented concerning the essential nature of such equipment [loran]. Consequently, the absence of loran (and the presence of the totally useless Decca Navigator) will not be considered an element of unseaworthiness." (SMR 14)

Although the evidence of the witnesses at trial demonstrated the usefulness of loran in navigating in this area, "appellate guidance" was sought by the Magistrate with respect to requiring loran as a matter of law. The carrier cannot transform such careful deliberation into a claim that the Magistrate "require(d) a higher standard of care for vessels equipped with a Decca Navigator than for vessels equipped with Loran" (Carrier's Brief p. 41). The carrier is improperly contending that a vessel equipped with a Decca Navigator, which is *unusable* in this area, need not have the up-to-date Radio List on board. Whether a ship has loran or Decca, or both, it should still be equipped with the up-to-date Radio List. The absence of loran, which is *usable* in this area, *highlights* the need to have the up-to-date radio direction finding publication on board.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

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(58972)

Due and timely service of Two copies
of the within *BRIEF* is hereby

admitted this 17th day of November 1970

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